IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1147

HAMP TURNER, ... PETITIONER,

VS:

UNITED STATES OF AMERICA,..... RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Hamp Turner, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on the 7th day of December, 1976.

OPINION BELOW

The opinion of the Court of Appeals (Appendix page, i, ii) is not yet reported.

JURISDICTION

The judgment of the Court below was entered on December 7, 1976. Rehearing was not sought.

9:00 a.m., the next morning. During the same period Cornett appeared at the strip mining site of the I. & S. Coal Company in Lee County, Kentucky, and instructed the employees in charge, Tom Lester, and Noxil Cline, to go see Owsley County Judge Turner in Booneville, Kentucky, immediately.

Clayton Addison relayed the message from Cornett to Clyde Coleman, superintendent for Lee County Consolidated Coal Company, who went to see Judge Turner in his office at the courthouse in Booneville on October 3, 1974. After Judge Turner informed Clyde Coleman that it was going to cost the operation *$200* a month or that he would have the Department of Motor Transportation stop his coal trucks every day; and that he was a politician and would keep them from getting mining permits in Owsley County. Mr. Coleman advised Judge Turner the final decision was not up to him and upon learning that Lyle Walker was one of the principal owners, Judge Turner instructed Mr. Coleman to have Lyle Walker in his office on October 7, 1974.

This information was relayed to Lyle Walker by Mr. Coleman and Mr. Walker did go to the office of Judge Turner in the courthouse in Booneville, Kentucky, on October 8, 1974, and took FBI Agent Fenton T. Scholl with him for the conference on this date. Agent Scholl was purportedly an accountant for Mr. Walker's coal mining firm. Walker and Scholl then went with Cornett to Judge Turner's

office for assurance and further conversation where Cornett outlined the terms of his discussion with Walker and Scholl to Judge Turner and Judge Turner indicated the terms outlined were accurate Judge Turner further stated that he had been in politics eight years and that it was time for him to start taking care of himself, and that the first $400 payment would be due the next day. Judge Turner further informed Walker and Scholl that the transaction was among the four of them and they were not to tell anyone or he would sign a warrant charging bribery of a county official and that he would be the one to hear the case before Owsley County people.

No payments were made to Judge Turner or Cornett for Walker, and the Lee County Consolidated Coal Company moved its operation out of Owsley County within a short time after the events mentioned.

In early October, 1974, Cornett appeared at the strip mining operation of I. & S. Coal Company in Lee County, Kentucky, and advised Noxil Cline and Tom Lester that Judge Turner wanted to see them in his office. When they arrived, Judge Turner advised them that it would be necessary for them to take care of him to the extent of $200 per month in order to have their coal moved across Owsley County. After this conversation Tom Lester received authority and paid Judge Turner the sum of $200.00

in cash. Denver Stacy and Charles Icenhour, owners of the I. & S. Coal Company were directed to go see Judge Turner, which they did sometime in October 1974. Stacy and Icenhour were informed by Judge Turner that it would cost them $200 per month, payable in cash, to haul their coal. Stacy and Icenhour objected to the payment of cash and Judge Turner directed them to make the checks payable to Cornett. Later in December of 1974, Charles Icenhour was again directed to see Judge Turner, at which time Judge Turner informed him that payment was to be increased from $200 to $400 per month and it was then understood that the checks would be made payable to Judge Turner instead of Cornett. One check was mailed to Judge Turner pursuant to this arrangement but was returned uncashed, with directions to make all checks payable to Cornett, which was done through March 13, 1975. A total of $2,400 was paid, of which $600 was in cash and the balance by checks payable to Cornett. Both Icenhour and Stacy testified all payments were made because of demands by Judge Turner in order for their mined coal to be moved through Owsley County to their market in Manchester, Kentucky.

It was stipulated that both Lee County Consolidated Coal Company and I. & S. Coal Company were engaged in interstate commerce, used equipment which had previously moved in interstate commerce and whose product was mined for and

shipped in interstate commerce. It was also stipulated that the checks made payable to Cornett were cashed by him in Kentucky and thereafter moved in interstate commerce from Kentucky to West Virginia in the ordinary course of events by the United States Postal Service.

REASONS FOR GRANTING THE WRIT

Petitioner contends that the trial Court erred in refusing to grant his motion for a judgment of acquittal with respect to Count 1 upon the close of the evidence. The indictment in Count 1 charged the defendants, Hamp Turner and John Cornett, with conspiring and agreeing to obstruct, delay, and affect commerce in that the defendants obtained and attempted to obtain money from several coal companies by consent, which money was not due the defendants, and which consent was induced by fear and under color of right. One of the essential elements necessary to a conviction under this indictment, is that the conspiracy or transaction associated with the conspiracy must have affected interstate commerce. Petitioner contends that there is not sufficient evidence to show interference with interstate commerce, and that the trial court erred in submitting that issue to the jury for determination.

The evidence at trial, even when viewed in the light most favorable to the Government, fails to establish that the defendant's acts interfered with

commerce. The evidence presented by the Government at best tended to show only a solicitation of a bribe from the coal companies involved. This case does not present the factual situation normally present in a successful Hobbs Act prosecution. The Hobbs Act involves extortion, attempted extortion, or conspiracy to extort, which interferes with commerce. The acts or threatened acts which form the inducement or basis for the extortion must interfere with commerce, or in the case of threats, be capable of constituting an interference with commerce had they been carried out. Such interference may take various forms: the interstate movement of supplies and materials may be obstructed or delayed, the conduct of businesses engaged in interstate commerce may be hindered, or the assets of such businesses depleted, etc. There are innumerable methods by which commerce may be affected, especially where, as in the Hobbs Act cases, the required effect need only be de minimis. However, the extortion or threatened actions must be such that there is an interference with commerce or would have been had the threats been carried out.

The statutory prohibition here involved, a Hobbs Act conspiracy to commit extortion and thus obstruct, delay, or effect commerce, must be distinguished from solicitation or acceptance of a bribe in exchange for a promise not to enforce the law. In *U.S.* v. *Critchley,* 353 F.2d 358 (3rd Cir.

1965), the defendants had successfully solicited a bribe from a roofing contractors' association, in exchange for his promise to withdraw a valid complaint he had filed with the municipal housing authority charging a particular roofer with violations of contract specifications. The defendant, additionally threatened to continue to prosecute the complaint pending before the housing authority and to make similar complaints against other roofers if his demands were not met. However, the Third Circuit held that there was not sufficient evidence to establish the interference with commerce where the only act or threatened act to be taken by the defendants contained in the charge, was simply to force compliance with the law on the contractor's part. The defendant was only threatening to bring before a municipal regulatory board a matter ripe for its attention and consideration. This could not in and of itself constitute an interference with commerce. Although an offense may have been committed in that case, it clearly was not a violation of the Hobbs Act.

So it is the case at bar, the evidence even when viewed most favorably to the government can only show an attempt on the part of Owsley County officials to solicit a bribe in exchange for their promise not to enforce the law vis-a-vis overweight coal trucks. The acts that Hamp Turner and John Cornett, Jr., allegedly threatened to take if their

demands were not met could not have interfered with interstate commerce. They allegedly threatened only to see that all overweight coal trucks were given citations for such offenses and that the maximum permissible fines under state law would be imposed. Even if the defendants had carried out these threats there could have been no interference with commerce. The coal trucks were running overweight, destroying the roads, and the fines that would have been imposed would have been within the law. Interstate commerce is not affected or interfered with by the enforcement of local highway regulations pursuant to the police power of the state. In fact, effective enforcement of highway weight limitations would actually promote interstate commerce through the preservation of both local and federal highway systems.

Nor can the checks received from I. & S. Coal Company by John Cornett, Jr., be viewed as affecting commerce by depleting the assets of that company. The defendants admitted the checks were received but contended they were paid as compensation for Cornett's services as a consultant. The jury agreed and acquitted the defendants on all substantive counts relating to the receipt of those checks. Money received as compensation for one's services certainly does not obstruct, delay, or affect commerce.

There is simply no evidence in this record to show any burden placed on commerce by the defendants actions. Neither the movement nor the price of any coal was in any way affected. The only actions threatened were to enforce the law. Clearly the government has failed to prove an essential element of the offense charged.

The Supreme Court of the United States has made it manifestly clear that the Travel Act was not to become a catch-all, under which, all local crime would be prosecuted. *Rewis* v. *U.S.*, 401 U.S. 808 (1971). Since the language and legislative history of the Hobbs Act is so similar to that of the Travel Act it would appear that Rewis, supra would also apply to both Acts. The reasoning of Rewis was repeated and underscored in a later Supreme Court Case, *U.S.* v. *Bass*, 404 U.S. 336, (1971).

In Rewis, supra the defendants were unquestionably conducting a lottery and gambling operation near the Florida-Georgia state line. There was evidence that out-of-state bettors traveled interstate to gamble at the establishment. In spite of this strong showing of gambling and interstate travel, the Supreme Court held at page 811:

> We agree with the Court of Appeals that it cannot be said, with certainty sufficient to justify a criminal conviction, that congress intended that interstate travel by mere

customers of the gambling establishment should violate the Travel Act.

In the instant case the factual connection with interstate commerce, if in fact any existed at all, was much less than in Rewis. The only facets of interstate commerce contended by the government to be affected were the mails and banking channels when certain payroll checks were mailed across one state line into Kentucky. There is no showing of interstate travel by any person as in Rewis and no showing that the facts of the instant case amounted to more than a purely local matter. The jury, in fact, found the mailing of the payroll checks to be innocent acts as evidenced by their verdict of not guilty on those counts.

Rewis goes on to say on Page 812:

> In such context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies.

In the instant case, as in Rewis, it was mere happenstance that I. & S. Coal Company had offices outside of the State of Kentucky. It cannot logically be argued that Congress intended to create a new

federal crime that totally hinged on the arbitrary issue of whether some faint connection could be shown with interstate commerce. There is no showing that either Judge Turner or John Cornett, the defendants below, ever traveled outside the State of Kentucky either before, during, or after the alleged "conspiracy". There is no showing that the defendants ever managed, established, or promoted any activity in another state. The additional language of Rewis follows:

> It is not for us to weight the merits of these factors, but the fact that they are not even discussed in the legislative history of Sec. 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another state. In short, neither statutory language nor Legislative history supports such a broad ranging interpretation of Sec. 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, ...

The Supreme Court continued this line of reasoning in Bass, supra at page 349:

> As this court emphasized only last term in Rewis v. United States, supra, we will not be quick to assume that Congress has meant to effect a significant change in the sensitive

relation between federal and state criminal jurisdiction.

It is transparently clear that the facts of the Rewis case are stronger than those alleged here, and as a consequence, if the facts in Rewis are too weak to invoke the Travel Act, the facts in this case must also be too inconsequential to invoke federal jurisdiction. All counts relating to the Travel Act and the Hobbs Act should be reversed as being far outside the ambit of the Congressionally prohibited area. If not, federal courts will soon attract prosecutions of all pool hall gamblers that are not prosecuted in local courts. Congress did not intend to prohibit such local matters and this Court should not invoke jurisdiction on such an overextended theory.

CONCLUSION

It is respectfully submitted that the Petitioner for a Writ of Certiorari should be granted.

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APPENDIX

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John P. Hehman, Clerk

NO. 76-1853
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

HAMP TURNER and
JOHN CORNETT, JR.
Defendants-Appellants

ORDER

BEFORE: WEICK, McCREE and LIVELY, Circuit Judges.

The court has examined the district court's charge to the jury in this prosecution for conspiracy to violate the Hobbs Act, 18 U.S.C. §1951; for violation of the Travel Act, 18 U.S.C. §1952 and for making false statements under oath to a grand jury in violation of 18 U.S.C. §1623. Though the instructions are lengthy they do not contain erroneous statements of law. The appellants argue that the instructions were confusing. However, the jury found the defendants not guilty under eleven of the fourteen counts submitted to them. We find no reversible error in the charge as given or in the

district court's refusal to give instructions requested by the defendants.

It is also contended that the defendants are entitled to a new trial because of inconsistency in the jury verdict. There is no inconsistency in a jury verdict finding a defendant guilty under a conspiracy count and innocent of one or more, or all, of the acts charged to have been done in furtherance of the conspiracy. Furthermore, this court has held that "consistency is not required in a jury verdict in a criminal case." *United States* v. *Daniel,* 528 F.2d 705, 708 (1976).

The affirmance of the judgment does not determine the amount of restitution which shall be required to be paid by the defendant Turner under the order of the district court requiring restitution as a special condition of his probation.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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